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## CITATIONS


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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. _____

UNITED STATES OF AMERICA, PETITIONER,

*v.*

MOORE-MCCORMACK LINES, INC., AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on September 29, 1962.

### OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (App. 34-52) is reported at 199 F. Supp. 522. The opinion of the court of appeals (App. 15-33) is reported at 308 F. 2d 866.

### JURISDICTION

The judgment of the court of appeals was entered on September 29, 1962. By order of Mr. Justice Douglas, dated December 27, 1962, the time for filing a petition for a writ of certiorari was extended to and including

January 28, 1963. The time for filing the petition was further extended to and including February 26, 1963, by order of the Chief Justice dated January 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Section 709(a) of the Merchant Marine Act of 1936 provides for payment to the United States of additional charter hire on government chartered ships "at the end of any calendar year" in which the charterer's "cumulative net voyage profits" exceed ten percent of its capital. The question presented is whether the charterer's liability to make those payments is affected by losses in subsequent years.

## STATUTE INVOLVED

Section 709(a) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1199(a), provides:

> Every charter made by the Secretary of Commerce pursuant to the provisions of sections 1191-1206 of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Secretary, as additional charter hire, one-half of such cumulative net voyage profit in ex-

cess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

STATEMENT

This is an action by the United States against a charterer of its vessels (and the charterer's surety) to recover "additional charter hire" pursuant to Section 709(a) of the Merchant Marine Act of 1936, 46 U.S.C. 1199(a). The opinions of the district court and court of appeals disclose the following pertinent facts.

In 1951, Moore-McCormack chartered the Government-owned "Good Neighbor Fleet," consisting of the S.S. URUGUAY, S.S. ARGENTINA, and S.S. BRAZIL. In addition to a fixed monthly basic charter hire, which is not here in controversy, the charter contract provides for the payment of "additional charter hire," pursuant to the Congressional directive in Section 709(a) of the Merchant Marine Act of 1936, 46 U.S.C. 1199(a) (*supra*, p. 2).[1] This provision, concisely stated, im-

[1] Pursuant to Section 709(a) of the Merchant Marine Act of 1936, clause 6 of the charter agreement with Moore-McCormick provides:

> (a) If at the end of the calendar year 1951, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D.C., within thirty (30) days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to one-half of such cumulative net voyage

poses upon a charterer the obligation to pay defined amounts of additional charter hire "whenever, at the end of any calendar year" of the charter its cumulative profits exceed ten percent of its capital employed in the business.

From the commencement of charter operation in 1951, until 1958, when the last of the vessels was redelivered to the government, Moore-McCormack maintained annual accountings for additional-charter-hire purposes. These annual calculations reveal that Moore-McCormack earned profits in 1951 and 1952, but incurred substantial losses in the remaining years of the charter.[2] On the basis of these figures, the Maritime

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profit in excess of 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period.

(b) The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire at such times and in such manner and amounts as may be required by the Owner; *provided* however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

[2] The undisputed results of the charter operation, to the extent known at the time of trial, are as follows:

| Year | Profit or (Loss) |
|---|---|
| 1951 | $ 609,236.25 |
| 1952 | 760,193.77 |
| 1953 | (2,066,962.82) |
| 1954 | (1,460,665.79) |
| 1955 | (1,283,257.12) |
| 1956 | (1,303,747.35) |
| 1957 | unaudited |

Administration[3] billed Moore-McCormack for additional charter hire for the first two years of the charter, 1951 and 1952. Thus, on November 28, 1958, Maritime submitted a final 1951 bill for $278,069.30, and on January 14, 1959, it submitted a final 1952 bill for $314,019.14. On February 17, 1959, Moore-McCormack refused to pay, contending—for the first time after many years of chartering[4]—that it was not liable for additional charter hire in respect of its first two calendar years of operation under the charter because it was entitled to carry forward and offset its 1951 and 1952 profits against its losses in subsequent years. The Maritime Administration rejected this contention, and the government brought suit to collect the $592,088.44 claimed as additional charter hire for the first two years of charter operation.

The District Court for the District of Maryland decided the case on cross-motions for summary judgment. It granted the government's motion, holding that the obligation to pay additional charter hire at the end of 1951 and 1952 imposed by Section 709(a) was final and subject to no later contingencies: "There is nothing

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[3] Admininstrative powers under the 1936 Act were originally given to the United States Maritime Commission, which was abolished by section 306 of the Reorganization Plan No. 21 of 1950, 64 Stat. 1277 (see note following 46 U.S.C. 1111). Concurrently Reorganization Plan No. 21 created the Federal Maritime Board and established within the Department of Commerce the Maritime Administration.

[4] As described by the court of appeals (App. 19), Moore-McCormack first chartered the Good Neighbor Fleet in 1938. This charter was suspended during World War II, and resumed in 1948. Upon its expiration in 1951, the present charter agreement was executed.

contingent about the obligation to pay imposed by sec. 709(a), nothing which suggests that there might be a refund or an offset as a result of possible losses in future years" (App. 42). The Court of Appeals for the Fourth Circuit reversed, holding that the statute—and particularly the phrase "cumulative net voyage profits"—indicated an intent that the annual payments of additional charter hire required by Section 709(a) were to be tentative until the completion of a final audit for the charter, at which time the charterer would be entitled to a refund if its total profits for the entire period of the charter were less than ten percent per year.

## REASONS FOR GRANTING THE WRIT

The holding of the court of appeals—that the payment of additional charter hire required by Section 709(a) "at the end of any calendar year" in which there are "cumulative net voyage profits" is merely a tentative accounting and that amounts so paid are subject to recovery by the charterer if there are losses in later years—is plainly inconsistent with the wording and structure of the statute and overrules an administrative construction consistently followed for over twenty years. The decision below involves a recurring issue of substantial importance and should therefore be reviewed by this Court.

1. The payment requirements of Section 709(a) are entirely clear. "[W]henever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed 10 per centum per annum * * * the charterer shall pay

over to the Secretary, as additional charter hire, one half of such cumulative net voyage profit in excess of 10 per centum per annum * * *." It is, we believe, conceded that at the end of the calendar year 1951 the cumulative net voyage profits of Moore-McCormack exceeded ten percent per annum. This being so, Moore-McCormack, at the end of 1951, was obligated to "pay over to the Secretary, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum." By the terms of the charter agreement, *supra*, p. 3, n. 1, this amount was to be paid "within thirty (30) days after the end of such year," *i.e.*, 1951. A similar immediate liability to the United States arose at the end of 1952 on the undisputed facts.

The statute has no provision authorizing a charterer to sue to recover amounts it has paid the United States if it has losses in later years. The statute nowhere imposes upon the Secretary a liability to repay amounts which have been received at the end of any calendar year under Section 709(a) if the charterer sustains losses subsequently. Nor did clause 6(b) of the charter agreement in this case (*supra* p. 4, n. 1) grant the charterer any such authorization to sue or create any such liability of the United States. It grants the Administration a power (never in fact exercised under the 1936 Act) to demand "preliminary payments" of additional charter hire prior to the conclusion of an often-long-delayed audit of the cumulative net profits of a charterer at the end of a particular calendar year. And it makes the United States liable for any overpayments made by the charterer prior to the completion of

such an audit of the state of profits at the end of any calendar year. But the charter agreement plainly does not (and it could not consistently with the statute) make losses in subsequent years the source of a right to a refund of payments duly and properly made pursuant to Section 709(a) in respect of cumulative net profits existing at the end of any prior calendar year. Any such payments are absolutely final.

The rights and liabilities of the parties in the present case cannot be affected by the fact that Moore-McCormack did not make payment of the sums it owed within thirty days of the end of the years 1951 and 1952. If at the end of 1953, a year of substantial losses, the charterer could not have sued and recovered sums which it had paid when they became due at the end of 1951 and at the end of 1952, it cannot now subtract its losses for the year 1953 from the amounts it is found to have owed at the end of 1951 and the end of 1952. Delay in auditing and payment cannot create new rights in the charterer.

Finally, the fact that Section 709(a) does not require or authorize the averaging of all profits and losses over the entire period of the charter (and thus make each prior payment of additional charter hire merely tentative) is made absolutely clear by the proviso to the statute which states that cumulative net profit accounted for after one calendar year of the charter "shall not be included in any calculation of cumulative net profit in subsequent years." This proviso would be wholly unnecessary to—and actually inconsistent with—a statute requiring averaging of all profits and losses over the entire period of the charter to determine additional charter hire. The proviso makes sense and

serves a useful function only if net profits once accounted for are considered finally and unconditionally determined; and are, for that reason, to have no effect upon the liability for additional charter hire at the end of subsequent years of the charter.[5]

2. The plain meaning of the words of Section 709(a) is confirmed by the long-continuing administrative construction. Since its passage in 1936 the statute has consistently been construed to require final, nonrefundable payments by the charterer "whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits" from the beginning of the charter or the last payment of additional charter hire exceed ten percent per year. This construction, which has always been held to preclude the consideration of losses in later years in determining the amounts of additional charter hire due for earlier profitable years, was spelled out in an opinion of the Assistant General Counsel of the Maritime Commission in 1941 and was also made the basis of a formal regulation[6] in 1950 interpreting Section 709 for the purposes of the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U.S.C. App. 1735, which incorporated by reference the provisions of the earlier statute. The

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[5] It is also significant to compare Section 709(a) with the provisions of 46 U.S.C. 1176, 1177, a contemporaneously enacted statute providing for recapture of excessive government subsidy payments on the basis of an averaging of all profits and losses of the vessel over a period of years. Section 709(a) contains nothing even remotely analogous to the elaborate provisions of the subsidy-recapture statute carefully detailing the methods of handling the contingent liabilities of the carrier and limiting the rights of the United States to enjoy the proceeds of interim payments by the carrier.

[6] 46 C.F.R. 299.49.

issue has arisen frequently in the hundreds of charter agreements administered over a period of more than twenty years and no charterer has been allowed an offset or refund as a result of later loss years from the amount of additional charter hire made payable by Section 709(a) at the end of an earlier year of the charter.

3. Despite these considerations, the court of appeals concluded that the payments of additional charter hire required by the statute at the end of any calendar year when "cumulative net voyage profits" exceeded ten percent per year were merely "preliminary" and "tentative" payments subject to refund in the event of later losses. The court rested its conclusion largely upon the word "cumulative", which, in the court's view, "indicates an intention that profits and losses shall be cumulated over the life of the charter" (App. 23). From this the court inferred that the annual payments required by Section 709(a) must be considered tentative.

The court mistook the function of the phrase "cumulative net voyage profits". The court's reading made the statute internally inconsistent—a contradiction that could be resolved only by calling a requirement for unqualified payments "tentative"—and it rendered the final proviso meaningless. The phrase "cumulative net voyage profits" actually serves two other, quite different, useful functions consistent with the rest of the statute. First, "cumulative" is used to indicate that the charterer's profits or losses are to be computed on an annual basis and not on a voyage basis, as is common in charter contracts. Second, and more important, "cumulative net voyage profits" is necessary to make

clear that payments of additional charter hire are due at the end of a calendar year of the charter only if the total of all losses and profits for that year and prior years of the charter subsequent to the last payment of additional charter hire results in a profit of more than ten percent per year. Thus if the charterer has a loss in the first year of the charter and a profit in the second year, additional charter hire is due at the end of the second year only if "at the end of [that] calendar year * * * the cumulative net voyage profits" (*i.e.*, the total profits for the two years) "shall exceed 10 per centum per annum" or 20 percent for the two years. In short, the term "cumulative net voyage profits" is a technical term intended to denote the total profits of a charterer for all years since the start of the charter or the last time his profits were such that he was required to pay additional charter hire. This starting date for totaling profits and losses to determine if any additional charter hire is due is specified by the proviso to Section 709(a) which states that a new start is to be made whenever there has been an earlier accounting and payment of cumulative net profits under the statute. There is not the slightest reason to suppose that the term "cumulative net voyage profits" was ever intended to cast doubt upon the government's right—plainly granted earlier in the section—to be paid and to retain additional charter hire with respect to any group of one or more calendar years at the end of which the charterer's cumulative profits exceeded ten percent per annum.

The United States contended before the court of appeals that the phrase "cumulative net voyage profits"

was intended to require the accumulation of the profits and losses of several voyages during the same year, and was not meant to allow losses of an earlier year to be subtracted in determining whether additional charter hire was due from the profits of a later year. Further consideration has made it apparent that this explanation of the phrase "cumulative net voyage profits"—which involved a departure from the position to which the Maritime Administration has adhered for over twenty years—is inconsistent with the words and the structure of the statute. We do not believe, however, that this explanation either misled the court below or militates against immediate review by this Court of the question presented. The right of a charterer to carry forward earlier losses in determining liability for additional charter hire in later years was not, and is not, in issue in the present case. The only question presented was, and is, whether Moore-McCormack's conceded liability for additional charter hire at the end of 1951 and 1952, the first two years of the charter, was final or merely tentative; and, on this question, there has been no inconsistency in the government's position.[7] The Maritime Administration position and all of its supporting rulings were carefully presented to the court of appeals by the parties. The court below carefully considered, passed upon, and rejected as "capricious" the uniform and, we submit, correct position of

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[7] Thus the district court carefully noted that it did not need to decide and it in fact "intimate[d] no opinion one way or the other" on whether the uniform Maritime construction of "cumulative net voyage profits" or that adopted by the government below was correct. App. p. 50, n. 16; see also App. 46-47.

the Maritime Administration over the last twenty years that "cumulative net voyage profits" means the total of profits and losses in all years since the beginning of the charter or the last payment of additional charter hire. (App., 27-30).

4. The issue involved in this case is of controlling importance in a large number of pending cases. It will also be of continuing significance in years to come. The provisions of Section 709(a) are incorporated by reference in Section 5(c) of the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1738(c). There are now pending in the district courts thirty-five cases under the 1946 statute involving the issue decided (incorrectly, we believe) by the court below. See App. 53-54. Further, in a number of additional instances, litigation of this same issue has not yet been initiated simply because of delays in auditing procedures. It is not possible to estimate reliably the total amounts in dispute, but it appears that the right to many millions of dollars turns on the single question of statutory interpretation at issue in this case. In these circumstances, Supreme Court review is warranted by the need for an authoritative construction of a statutory provision which has become standard in federal charter agreements since 1936.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ARCHIBALD COX,
*Solicitor General.*
JOHN W. DOUGLAS,
*Acting Assistant Attorney General.*
ALAN S. ROSENTHAL,
STEPHEN B. SWARTZ,
*Attorneys.*

FEBRUARY, 1963.

## APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8581

UNITED STATES OF AMERICA, APPELLEE,

*versus*

MOORE-MCCORMACK LINES, INC., AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued May 29, 1962. Decided September 29, 1962.)

Before SOPER, HAYNSWORTH and BRYAN, Circuit Judges.

J. Franklin Fort (Frank B. Ober; Southgate L. Morison: Israel Convisser; Ober, Williams, Grimes & Stinson, and Kominers & Fort on brief) for Appellants, and Lawrence F. Ledebur, Attorney, Department of Justice, (William H. Orrick, Jr., Assistant Attorney General; Joseph D. Tydings, United States Attorney, and Morton Hollander and Leavenworth Colby, Attorneys, Department of Justice, on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

The Maritime Administrator and some subsidized American shipping companies, which were also charterers of government-owned vessels, have differed over the computation of additional charter hire for the chartered vessels. Preliminary phases of the controversy, as

it affects other shipping companies, have been considered by the courts.[1] but this is the first case to present the merits for decision. This controversy comes to us now on an appeal by Moore-McCormack Lines, Inc. and its surety from a judgment of the District Court awarding the United States $592,088.44 as additional charter hire, together with interest thereon.[2] The amount in actual controversy, however, is only half the amount of the award, for if the shipping company is not liable for the additional charter hire claimed, the parties agree it has been overpaid in operating differential subsidy in an amount equal to fifty per cent of the additional charter hire claim.

The dispute revolves around the method of computation of profits in the operation of the chartered vessels. Moore-McCormack contends, in effect, that no additional charter hire is payable because there were no net profits resulting from the operation of the chartered vessels during the period of the charter if that period is viewed as a whole. The United States, on the other hand, contends that additional charter hire must be computed and paid with respect to profit realized in profitable years and that losses in the other years from the chartered operations cannot be used to reduce or offset the profit in earlier profit years. Decision turns upon an interpretation of § 709(a) of the Merchant Marine Act of 1936, which provides no clear or certain answer. The District Judge construed it as the government construes it, and that construction is certainly not impermissible, but, for the reasons which presently will

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[1] See, *e.g.*, American-Foreign Steamship Corporation v. United States, 2 Cir., 265 F.2d 136, rev. 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491, opinions on remand, 291 F.2d 598; American Export Lines, Inc. v. United States, Ct.Cl. 290 F.2d 925.

[2] United States v. Moore-McCormick Lines, Inc., D. Md., 199 F.Supp. 522.

appear, we think, properly construed, the statute and the charter require the computation of profits and losses, for the purpose of a final determination of additional charter hire, on the basis of the charter period rather than upon the basis of segmented, calendar years falling within the charter period.

By § 101 of the Merchant Marine Act of 1936,[3] Congress declared its purpose to foster the development and encourage the maintenance of a merchant marine composed of safe and well-equipped vessels constructed in the United States, manned and owned by American citizens and operated under the flag of the United States, which would be sufficient to carry all of the domestic water borne commerce and a substantial part of the foreign water borne commerce of the United States, and which, in time of war, would be capable of serving as a naval and military auxiliary. To further those general purposes, the Congress, among other things, provided for the subsidization of construction of ships in American shipyards and the operation of qualifying vessels on prescribed routes. Generally, the operating differential subsidy was to be computed on the basis of the difference in the cost of operating the American vessels and related facilities and the cost of operation of foreign flag vessels in competition with them. Provision was made, however, for the recapture of operating differential subsidy payments to the extent of fifty per cent of the profits from the subsidized operations if and to the extent that those profits exceeded ten per centum per annum of the capital necessarily employed in the subsidized operations.[4] The Congress, however, was well aware of the cyclical nature of the shipping business and the necessity of accumulation of profits in

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[3] 46 USCA §1101.

[4] See § 606 of the Act, 46 USCA § 1176.

profitable years to offset losses in poor years. It, therefore, provided that the operating differential subsidy recapture provision operate finally with respect to periods of more than twelve months. While annual accountings were required, profits subject to partial recapture were to be computed over a five-year period as originally enacted, and the period of this computation was enlarged by amendment in 1938 to ten years. Thus the computation of profits for the purpose of recapture of operating differential subsidies is based upon an averaging of profits over a ten-year period, and the recapture provision is inoperable if substantial profits in some years are offset by losses in other years within the same ten-year period.

In further implementation of its declared purpose, the Congress provided for the chartering of vessels owned by the United States to private operators.[5] The charter was to go to the qualified bidder proposing the highest monthly charter hire, and operating differential subsidy contracts were authorized with respect to the operation of the chartered vessels upon the same terms as for the operation of privately owned vessels. As with respect to the subsidy payments, however, the Congress contemplated the possibility that operation of the chartered vessels might produce unusual profits, and so it embodied in the Act a provision for additional charter hire equal to fifty per cent of the cumulative net voyage profits of the operation of the chartered vessels after a deduction of an amount equal to ten per centum per annum of the capital necessarily employed in their operation. Section 709(a) of the Act,[6] embodying the additional charter hire provision, is in the following language:

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[5] See § 704, et seq. of the Act, 46 USCA § 1194, et seq.

[6] 46 USCA § 1199.

"(a) Every charter made by the Secretary of Commerce pursuant to the provisions of sections 1191-1204 of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Secretary, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided* That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."

Under these provisions of the Act, Moore-McCormack first chartered the government-owned vessels, SS Uruguay, SS Argentina and SS Brazil, known as the "Good Neighbor Fleet," in 1938. During the Second World War, the operation of these vessels by Moore-McCormack was suspended, but was resumed in 1943. In July 1951, the charter under which Moore-McCormack had been operating its vessels having expired, it became the charterer of the same vessels under a new charter, having been the successful bidder for it. This bare boat charter was for an initial period of three years, but the period was later extended with respect to two of the ships. The charter provided for the payment of basic charter hire of $22,000 per month per vessel, or $792,000 per year for the three vessels. In accordance with the requirement of § 709 of the Act, the

charter contained a provision for additional charter hire, which is quoted in the margin.[7]

In 1951 Moore-McCormack's subsidy agreement was also amended to require the operation of these three vessels with not less than twenty-four nor more than twenty-six sailings each year between New York and the East Coast of South America. That agreement obligated Moore-McCormack to operate the vessels through the year 1957 and, on demand, to replace them with suitable new vessels.

The SS Uruguay was redelivered to Maritime on April 27, 1954, pursuant to an amendatory agreement, the Brazil on December 27, 1957, and the Argentina on August 22, 1958. In 1958, Moore-McCormack placed in

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[7] "Clause 6. *Additional Charter Hire.* (a) If at the end of the calendar year 1951, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D.C., within thirty (30) days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to one-half of such cumulative net voyage profit in excess of 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period.

"(b) The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire at such times and in such manner and amounts as may be required by the Owner; *provided* however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

service new replacement vessels, which, with the aid of construction subsidy, it had caused to be constructed.

Final determination of all items entering into a calculation of net voyage profits must await the settlement and adjustment of many matters. While preliminary accountings were submitted in accordance with Clause 6(b) of the charter,[8] Moore-McCormack's final accounting for 1951 was not settled and approved by Maritime until November 7, 1958. The accounting for 1952 was approved on December 19, 1958 and the Company's final accounting for 1953 was not submitted to Maritime until February 17, 1959. By the time of trial, however, final accountings had been audited and approved through those for the year 1956. That for the year 1957 is still unaudited, and there is uncertainty as to whether the operations of the chartered vessels during 1957 resulted in a net loss of $1,231,105.74, as disclosed by the last accounting for that year, or a profit of approximately $157,929, as represented to the District Court on the basis of Moore-McCormack's latest figures. The earlier years, however, disclosed net voyage profits and (losses) as follows:

| | |
|---|---|
| 1951 | $ 609,236.25 |
| 1952 | 760,193.77 |
| 1953 | (2,066,962.82) |
| 1954 | (1,460,665.79) |
| 1955 | (1,283,257.12) |
| 1956 | (1,303,747.35) |

The only profits in the relevant years, assuming no profit in 1957, were realized in 1951 and 1952. In 1951, the allowable return of ten per cent of the capital employed in the charter operation was $53,097.66, so that, of the net voyage profit of $609,236.25, some $556,139.59

[8] See footnote 7, supra.

was excess and subject to possible division. The allowable return in 1952 was $132,155.50, which subtracted from the net voyage profit of $760,193.77, leaves an excess profit of $628,038.27, subject to possible division.

It is clear, however, that Moore-McCormack's charter operation over the life of the charter resulted in a very substantial loss. The loss in 1953 alone was greater than the total combined profit realized in 1951 and 1952, before reduction of allowable return. The losses in the succeeding charter years swelled the cumulative loss to an amount far in excess of any nominal profit that might have been earned in 1957.[9] Thus, it is apparent that while the charter operations over the life of the charter resulted in substantial net losses to Moore-McCormack, it had net profits in 1951 and 1952. If, as the Government contends, we look only to the results of the operations in the profit years, the additional charter hire of $592,088.44 is due. On the other hand, if we are to look to the results of the charterer's operations over the life of the charter, there were no profits subject to division under the provision for additional charter hire.

These computations of profits and losses were made only after the computation of subsidy. In computing subsidy here, the Government's claim of additional charter hire was treated as a liability. Adjudication that Moore-McCormack is not required to pay the additional charter hire claimed will result in a recomputation of its subsidy, with the result that one-half of the amount claimed as additional charter hire will become payable to the United States as an overpayment of subsidy, or as recoverable under the recapture provision of § 606.

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[9] It is the Government's position that no profit for 1957 has been proven, and that, for our present purposes, it must be assumed that 1957 was a loss year.

The statute requires the payment of additional charter hire "whenever, at the end of any calendar year, subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed ten per centum per annum * * *: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profits in subsequent years."

The crucial words are "cumulative net voyage profits." Use of the word, "cumulative" indicates an intention that profits and losses shall be cumulated over the life of the charter, just as profits and losses are cumulated over a fixed period of years for purposes of the closely related subsidy recapture. If that is not the import of the word, its use was wholly unnecessary and the entire proviso is both unnecessary and redundant.

The United States contends that, because accounting on the basis of each completed round voyage is traditional in the shipping business, use of the word "cumulative" was necessary to show that additional charter hire is to be computed on the basis of the results of all voyages completed during the calendar year, rather than upon a voyage by voyage basis. The conclusion does not flow from the premise, however. Completed voyages as a method of accounting may be traditional in the shipping business, as completed contracts are a traditional method of accounting in the construction industry. Since annual accounting is clearly required, however, "net voyage profits" means no less than "net profits during the year computed on the basis of a completed voyage method of accounting." Whatever the accounting method and whether it be traditional or requisite, or both, the term "net profits," without qualifying words but used in connection with a requirement of annual reporting, is quite sufficient to require an aggregation of the results of all voyages or other

transactions which, under the method of accounting employed, are properly allocated to the year of the report.

Use of the word "cumulative" is not inconsistent with the purpose suggested by the United States, but it imports something more. That it was so intended is further suggested by the fact that reference to the execution of the charter immediately precedes the word "cumulative." The natural reading is that the period of cumulation commences with the execution of the charter and extends to "the end of any calendar year, subsequent to the execution of such charter * * *."

Thus read, all of the words of the statute may be given effect and harmonized. If at the end of the first year after execution of the charter, excess profits are disclosed, a payment on account of additional charter hire is required. If at the end of the second year further cumulative excess profits from the charter operations are disclosed, though, on the basis of the latest figures, all or most of the profit was attributable to the first year, a further payment on account is required, but then the proviso operates to prevent a pyramiding of profit in the computation of additional charter hire.

This interpretation of the statute would treat each annual report and each payment on account of additional charter hire as tentative, for what, if any, additional charter hire ultimately will be found to be due, cannot be determined until after expiration of the charter. Clause 6(b) of the charter, however, specifically provides that they are. Payments of additional charter hire are preliminary and subject to adjustment until the rendition of the preliminary statement or the completion of a final audit, at which time the charterer must pay such additional charter hire as may

be due and any overpayment will be refunded to the charterer "as may be required." [10]

This reading of the statute is consistent with prescribed procedures for subsidy recapture. There, it is plain that there is no recapture of subsidy unless profits, computed over a ten-year period, exceed ten per centum per annum of the capital necessarily employed in the subsidized operations. During the ten-year period, however, if profits exceed ten per centum per annum, the excess, annually or more frequently, must be deposited in a restricted special reserve fund.[11] Withdrawals from the special reserve fund may be made to reimburse the contractor's general funds for losses in later years and to pay to the United States such sums as may be later found to be due under the subsidy recapture clause of § 606. The effective result is tentative annual accounting of subsidy return and a segregation of funds to cover the obligation of repayment when the amount of the requisite repayment is finally determined sometime after the expiration of the ten-year period. That arrangement is comparable to the requirement of § 709(a), as we read it, of tentative annual reports and payments on account of additional charter hire, subject to final determination and adjustment after expiration of the charter when the cumulative net voyage profits, over the life of the charter, have been calculated.

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[10] The final audit to which Clause 6(b) of the charter refers, may well be one final audit of all operations under the charter made after its expiration. On the limitations question, that was the position of the shipping companies in the cases reported sub nom. American-Foreign Steamship Corporation v. United States. And see Maritime's circular letter quoted by Judge Hincks in footnote 4 of his opinion for the majority of the first en banc court, 265 F.2d at 145.

[11] See § 607(c) of the Act.

It is clear that the term "cumulative net profits" was used in § 607(b) in the sense in which we read it, for there are the added words "from the date the contract was executed." If it may be said that § 709 contains no comparable words "from the date the charter was executed," there is no internal evidence that the Congress was using the word "cumulative" to mean only an aggregation of the results of voyages completed during a single calendar year. The legislative history indicates that "cumulative" was not intended to have that restricted construction.

There is no conclusive legislative history. There were earlier bills, however, providing for subsidy and subsidy recapture, and some of them provided for chartering government-owned vessels and payment of additional charter hire based upon a computation of the charterer's net profits. Indeed, § 47 of the committee print of March 30, 1936 of S. 4110[12] contains the identical language which ultimately became § 709. That Bill's provision for subsidy recapture, quoted in the margin,[13] was strikingly comparable. S. 4110, as orig-

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[12] 74th Cong., 2d Sess., February 24 (calendar day, February 27), 1936, introduced by Senator Guffey.

[13] "Sec. 35. To safeguard the public interest in the administration of the operating-differential subsidy, every contract executed under this title shall contain provisions requiring * * * (3) that when at the end of any calendar year subsequent to the first payment of any sum as operating-differential subsidy to any operator, the cumulative net profits of said operator, after deducting depreciation charges, including depreciation expenses of said operator's vessels based upon a twenty-year life expectancy, exceed 10 per centum per annum upon its net worth necessarily utilized in the operation of the subsidized vessels, services, routes, and lines, said operator shall pay over to the Commission 50 per centum of such net profits in excess of 10 per centum per annum: *Provided, however*, That such payments to the Commission shall never exceed the total amount of operating differential subsidy theretofore paid to said operator *and the accumulated net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years*: * * *"

inally introduced, also provided for subsidy recapture based upon a division of "cumulative net profits."

In the hearings on these and earlier bills, there had been much emphasis upon the cyclical nature of the shipping business. Members of the Congress expressed the decided opinion that shipping companies should be allowed to offset profits in good years against losses in the poor years. It was continuing concern on that score which led to the enlargement in 1938 of the period of computation of profits, subject to division under subsidy recapture, to ten years.

Mr. J. C. Peacock, the Director of the Shipping Board Bureau of the Department of Commerce, appeared as a witness in hearings held by the Senate Committee on Commerce on March 9 and 10, 1936 on S. 3500, S. 4110 and S. 4111. Asked about the terms "cumulative net profits" and "cumulative profits" as used in S. 3500, Mr. Peacock responded:

> "After that, and after the reserve, if the *cumulative net profit* at any year, after setting aside those reserves, exceed 10 per centum upon the company's true investment, if I recall rightly, from then on, at the end of 5 years 50 per centum of such *cumulative profits* in excess of said reserves shall be paid to the Authority."

A bit later he responded as follows:

> Senator Gibson. "Then it would be on a cumulative profit basis?"
>
> Mr. Peacock. "Yes. Which would reflect the losses in the intervening years, too."

Maritime has consistently interpreted the word "cumulative" to permit a combining of the results of operations of more than one year, at least when the loss year precedes the profit year.

The question first arose with respect to Moore-McCormack's operation of these same ships. Their operation resulted in a small net loss for 1938, but in 1939 there was a profit in excess of ten per cent of the capital employed in their operation. Maritime's Assistant General Counsel prepared a memorandum for the Director of the Division of Finance in which he emphasized the fact that the basis of additional charter hire under § 709 is the *cumulative* voyage profits at the end of any calendar year. "This," he wrote, "is not the legal equivalent of prescribing that the profits to be taken into account are only those of the year then ending. The use of the word 'cumulative,' as well as other language in Section 709, is against this interpretation. * * *."

Accordingly, Moore-McCormack was allowed to combine the results of its operations for the two years 1938 and 1939 and to settle its obligation for additional charter hire on the basis of the cumulative net voyage profits over the two-year period.

The same question again arose with respect to the operation of these same vessels in the period 1948-1951. Their operation resulted in net losses in 1948 and 1949, but substantial and excess profits in 1950 and the first-half of 1951, ending with the expiration of that charter. Moore-McCormick settled its liability for additional hire on the basis of the cumulative results of its operations during the four-year period ending July 12, 1951, when that charter expired.

The same question arose in connection with the operations of another charterer which suffered a net loss in 1946 but realized excess profits in 1947. In the Commission's minutes of February 21, 1950, there is a second legal opinion, confirming the earlier opinion of its Assistant General Counsel, that the results of the two

years should be combined for the purpose of computing additional charter hire.

By the Merchant Ship Sales Act of 1946,[14] Congress authorized the sale or chartering of surplus war-built merchant vessels. By § 5[15] of that Act, the charters of such vessels were made subject to the requirement of § 709 of the Merchant Marine Act of 1936. In 1950, Maritime adoped a formal regulation interpreting § 709 of the 1936 Act as incorporated by reference in the 1946 Act. That regulation permits a combining of a loss or a deficiency in net profit in one year with an excess profit in a succeeding year. The regulation does not authorize the carry forward of a profit from one year to a succeeding loss year, and the regulation refers to the proviso of § 709 in apparent explanation of the authorization to carry forward losses but not profits.

Maritime, thus, has consistently and formally interpreted the words "cumulative net voyage profits" as used in § 709 to require an accumulation of the results of the charter operations over the period of the charter. The limitation introduced by the 1950 Regulation under the 1946 Act that only losses could be carried forward, did not come from any restrictive interpretation of the word "cumulative"; it arose out of Maritime's construction, at that time, of the proviso at the end of § 709.

The proviso of § 709 contains no such limitation, however. Its obvious purpose was to assure that duplicating payments of additional charter hire should not be required on account of the same profit. Maritime's 1950 interpretation of the proviso, born of its concern over a carry forward of profits rather than a carry back of losses, seems capricious. At least, we cannot ascribe to

[14] 50 USCA App. 1735, et seq.

[15] 50 USCA App. 1738(c).

the Congress a purpose to require additional charter hire of $50,000 of a charterer who has excess profits of $100,000 in one year and a loss of a like, or even a much larger, amount in the succeeding year, when no additional hire would be due if it lost $100,000 the first year and had excess profits in a like amount in the second year. The proviso is given effect and is reasonably construed if interpreted to prohibit only the use of the same reported profit in the calculation of additional charter hire in successive accountings.

The United States, through its Department of Justice, apparently recognizing the weakness of Maritime's restrictive interpretation of the proviso of § 709, disavows Maritime's consistent and formal interpretation of the word "cumulative." It contends that the statute does not permit a combining of losses and profits of different years, whether the loss year succeeds or precedes the profit year. The interpretation, however, is not the most natural reading of the statute; it is not supported by what is to be gleaned from the legislative history, and it conflicts with the consistent administrative construction.

The United States seeks to bolster its interpretation by reference to the fact that in § 606, and elsewhere, the Congress made quite plain and specific its intention that profits and losses were to be cumulative, while that intention is not so clearly evident in the language of § 709. In § 606, however, that intention is made plain because the statute, itself, had to provide the specific period over which the cumulation of profits and losses was to occur, while, under § 709, the period of cumulation is dependent upon the period of the charter. The exact language of § 606(5) could not be employed in § 709. There is also the countervailing consideration that the congressional purpose generally to permit and require cumulation of profits over periods of successive

years applied to its provision for additional charter hire as well as to its provision for recapture of operating differential and construction subsidies. If other words than those employed in § 709 might have provided a clearer expression of the congressional intention, it does not follow that a construction of that section which harmonizes it with the general congressional purpose is not to be preferred to one that leaves it in disharmony with those obvious purposes.

Finally, the United States makes an irrelevant assertion that the provision for additional charter hire was not intended to guarantee a profit to the charterer. Of course, it was not. Moore-McCormack, over the life of this charter, has suffered a cumulative loss of several millions of dollars. The question is not whether the United States is required to reimburse it for that loss, for there is nothing which suggests that it is. The only question is whether Moore-McCormack is required to pay an additional sum on account of additional charter hire, which, after subsidy adjustment, will increase its cumulative loss by approximately another $300,000. Moore-McCormack claims no right to a profit and no right to reimbursement for any loss sustained. It contends only that, having paid the basic charter hire of $22,000 per month per vessel, it should not be required to pay additional charter hire when it sustained over the period of the charter very substantial losses in its charter operations.

We conclude, therefore, that, properly construed, § 709 permits and requires the cumulation of profits and losses over the period of the charter as the basis of the calculation of additional charter hire, and that no additional charter hire is now due by Moore-McCormack by virtue of its charter operations under the 1951 charter.

The United States makes a further contention that

Moore-McCormack is estopped to contest the claim for additional charter hire. This arises out of the fact that Moore-McCormack has filed annual reports required by Maritime and in the form prescribed by Maritime, without asserting its present contention. Estoppel could hardly arise, however, out of its compliance with Maritime's reporting and accounting requirements, and the point was entirely academic until the results of the charter operations in all of the years was known. Moore-McCormack did make its position known in 1957 before final approval of its accounting for any year within the charter period.

The United States also points to the fact that Moore-McCormack filed a legal memorandum with Maritime in 1941, in which it took an inconsistent position, and that it did not contest in the courts Maritime's failure to combine a small loss in 1942 with an excess profit in 1941, realized by Moore-McCormack in the charter operation of the SS West-Keene. These, however, serve as a very insubstantial basis for a finding of an estoppel. If it once made an inconsistent contention in 1941, its position at all other times was quite consistent and was asserted with respect to the operations of these same ships under the earlier charters. Moreover, Maritime then accepted the consistent contentions as they there applied.

Certainly, acquiescense in Maritime's requirements of it ought not to foreclose the present contention that Maritime has improperly construed and applied the statute.[16]

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[16] Sword Line, Inc. v. United States, 2 Cir., 228 F.2d 344, aff'd. 230 F.2d 75, aff'd. as to admiralty jurisdiction, 351 U.S. 976, 76 S.Ct. 1047, 100 L.Ed. 1943; American Export Lines, Inc. v. United States, C.Cl. 290 F. 2d 925; Dichman, Wright & Pugh, Inc. v. United States, S.D.N.Y., 144 F. Supp. 922; A. H. Bull Steamship Co. v.

The District Court considered the estoppel question. It did not decide it, for it was unnecessary to do so in light of its construction of § 709. However, it indicated great doubt as to whether an estoppel could arise and stated its opinion that it was very unlikely that Maritime would have terminated Moore-McCormack's operation of the "Good Neighbor Fleet" if Moore-McCormack had given earlier indication that it would raise the pending question in the event that, after termination of the charter, it appeared that it had suffered an overall loss. We agree with those observations of the District Court and find no basis for the imposition of an estoppel.

We conclude that since Moore-McCormack suffered an overall substantial loss in the charter operation during the period of the charter, there is no additional charter hire due under § 709. Since it also appears however that there has been an overpayment of subsidy, or that subsidy payments are subject to some recapture, because of our determination that no additional charter hire is due, the case will be remanded to the District Court for entry of such further orders and the conduct of such further proceedings as may be required in the light of this opinion.

*Reversed and remanded.*

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United States, C.Cl., 108 F.Supp. 95; Southeastern Oil Florida, Inc. v. United States, C.Cl., 119 F.Supp. 731, cert. den. 348 U.S. 834, 75 S.Ct. 56, 99 L.Ed. 658; Central Gulf Steamship Corporation v. United States, C.Cl., 172 F.Supp. 701.

[Opinion of the District Court:]

* * * * *

THOMSEN, Chief Judge.

This is a suit by the United States to recover from respondent Moore-McCormack Lines, Inc., and its surety "additional charter hire" alleged to be due the government under a bareboat charter of three government vessels.

The first two causes of action seek a judgment (1) declaring the rights and obligations of the parties with respect to the payment of additional charter hire under sec. 709(a) of the Merchant Marine Act, 1936, 46 U.S.C.A. § 1199(a), and Clause 6 of Charter Contract No. MA—153, and (2) directing respondents to pay to the government as such additional charter hire $278,069.30 for the year 1951 and $314,019.14 for the year 1952, a total of $592,088.44, plus interest.

A third, alternative cause of action seeks recovery of $296,044.22, plus interest, the amount agreed by the parties to be due the government for reimbursement of operating differential subsidy payments if the government is not entitled to recover the amounts claimed for additional charter hire.

There is no dispute about any material fact, and each side has filed a motion for summary judgment, as permitted by Admiralty Rule 58, 28 U.S.C.A., recently adopted by the Supreme Court. The motions are for partial summary judgment only, since a fourth cause of action claims damages for inventory shortages which are disputed.

The Merchant Marine Act, 1936 (The Act), 49 Stat. 1985, 46 U.S.C.A. §§ 1101-1294, contains twelve subchapters. Subchapter VI, sec. 601 et seq., is titled "Op-

erating-Differential Subsidy". It includes the operation of vessels chartered by the carrier as well as vessels owned by the carrier. Subchapter VII, sec. 701 et seq., is titled "Private Charter Operation". Although the several subchapters deal with the same general subject—aid to the American Merchant Marine—they contain distinct provisions.

Sec. 709(a) of the Act, 46 U.S.C.A. § 1199(a), a part of the subchapter dealing with private charter operations, required the government [1] to collect additional charter hire as follows:

> "(a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."

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[1] The Maritime Commission was abolished, on May 24, 1950, by sec. 306, Reorganization Plan No. 21 of 1950, 64 Stat. 1277, as set forth in a note following 46 U.S.C.A. § 1111. The Plan concurrently created the Federal Maritime Board and established within the Department of Commerce the Maritime Administration, which acts by and through the Maritime Administrator. It was the Maritime Ad-

The charter (No. MA—153) required Moore-McCormack to pay to the government a fixed monthly rental, called "basic charter hire", and, if the chartering were sufficiently profitable, to pay at the end of each calendar year a further, profit-sharing rental, called "additional charter hire". Clause 6 of the charter, dealing with additional charter hire, set out under "Facts" below, was based upon sec. 709(a).

The principal issue presented by the motions for partial summary judgment is whether sec. 709(a) requires that the additional charter hire be computed and paid separately for each calendar year, or whether the additional charter hire may be averaged over the life of the charter.

The government contends that the statute and the charter requires that additional charter hire be calculated separately upon each calendar year's "cumulative net voyage profits", and that a second cumulation or averaging over the years is neither required nor permitted. Moore-McCormack contends that it is entitled to average the profit-sharing rental over the whole life of the charter by carrying forward the cumulative net voyage profits from each of the calendar years 1951 and 1952 and offsetting such profits against the losses sustained in subsequent calendar years.

The government also contends that Moore-McCormack is estopped to deny the validity of the government's position, by reason of Moore-McCormack's acts and failure to act over a long period of years, including the entire period of the charter.

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ministration, as successor to the Commission, which negotiated the charter involved in this suit. The several agencies will be referred to collectively herein as "Maritime". The statute is quoted as it existed at that time. By an amendment adopted in 1952 "Secretary of Commerce" was substituted for "Commission" in the first line of sec. 709(a).

## Facts

On April 18, 1951, Maritime issued an invitation for competitive bids for the charter of the "Good Neighbor Fleet", consisting of the vessels S.S. Uruguay, S.S. Argentina and S.S. Brazil. Moore-McCormack replied to the invitation on June 1, 1951. Its bid was accepted, and Moore-McCormack and Maritime entered into Charter Party Agreement No. MA—153.[2] Clause 5 of the Charter provided that Moore-McCormack would pay to Maritime a fixed primary monthly rental or "basic charter hire" of $22,000 per month for each of the chartered vessels. Clause 6 provided for "additional charter hire", as follows:

> "(a) If at the end of the calendar year 1951, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall over to the Owner at Washington, D. C., within thirty (30) days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to one-half of such cumulative net voyage profit in excess of 10

[2] Thereafter, on August 14, 1951, Moore-McCormack (as principal) and respondent Indemnity Insurance Company of North America (as surety) executed their joint and several bonds in the penal sum of $250,000 for the purpose of insuring performance of Moore-McCormack's obligations under the charter, including, specifically, performance of the obligation to pay charter hire.

per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period.

"(b) The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire at such times and in such manner and amounts as may be required by the Owner; *provided* however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

The charter was initially for a period of three years, subject to extension for additional periods by mutual agreement. It was extended for two of the vessels. Moore-McCormack also agreed to construct new and more modern vessels to replace the chartered vessels at a later date. That agreement was covered by other provisions of the Act.

Following the execution of the charter agreement, Maritime delivered the three chartered vessels to Moore-McCormack on various dates in July and August 1951. Moore-McCormack thereafter operated the Uruguay until April 27, 1954, the Brazil until December 27, 1957, and the Argentina until August 22, 1958, on which dates the respective vessels were redelivered to Maritime.

Moore-McCormack's cumulative net voyage profit

from operations under the charter during calendar year 1951 after deducting the "allowable return" was $556,138.59. The similar figure for the year 1952 was $628,038.27. However, Moore-McCormack sustained losses in each of the succeeding calendar years 1953 through 1957.

At all pertinent times, Moore-McCormack was subsidized by Maritime under Title VI of the Act, 46 U.S.C.A. § 1171 et seq., and had an "Operating Differential Subsidy Agreement" with Maritime, designated as Contract MCe-62436. By an appropriate amendment to that contract, Moore-McCormack's operation of the chartered "Good Neighbor Fleet" was subsidized.

Moore-McCormack submitted annual combined accountings under its subsidy agreement No. MCe-62436 and its charter agreement No. MA-153. Those accountings determined not only whether any additional charter hire was due under sec. 709(a), but also the total amount of subsidy to be paid to Moore-McCormack under its subsidy agreements and the amount of subsidy to be "recaptured" by Maritime.[4] In those accountings Moore-McCormack deducted as an expense the additional charter hire for which the government

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[3] Moore-McCormack's separate annual accountings for the calendar years 1951 through 1956, as audited and approved by Maritime Administration may be summarized as follows:

| Year | Cumulative Net Voyage Profit or (Loss) | Allowable Return (10%) of Charterer's Capital Investment | Excess Profit | One-Half Excess Profit |
|---|---|---|---|---|
| 1951 | $609,236.25 | $ 53,097.66 | $556,138.59 | $278,069.30 |
| 1952 | 760,193.77 | 132,155.50 | 628,038.27 | 314,019.14 |
| 1953 | (2,066,962.82) | | | |
| 1954 | (1,460,665.79) | | | |
| 1955 | (1,283,257.12) | | | |
| 1956 | (1,303,747.35) | | | |
| 1957 | (1,231,105.74) | (unaudited) | | |

[4] See sec. 606(5) of the Act, 46 U.S.C.A. § 1176(5).

now sues.[5] In computing the additional charter hire, Moore-McCormack did not attempt to combine its cumulative net voyage profits in calendar year 1951 with its cumulative net voyage profits in calendar year 1952, and did not attempt to offset such cumulative net voyage profits (either separately or combined for the two years) against losses sustained in the subsequent calendar years 1953-1957 (so as to average the profits over the whole life of the contract). On the contrary, Moore-McCormack at all times accounted for cumulative net voyage profits (or losses) from its operations under Charter MA-153 on a separate calendar year basis, cumulating only the results of the several voyages conducted within a single calendar year, without claiming the right to combine or average the cumulative results of successive years. It is true that this form of accounting was required by Maritime, but Moore-McCormack made no objection with respect thereto in connection with these vessels until after the charter had terminated and it had redelivered all the chartered vessels to the government.[6]

Because of the complexities of the accounting and the fact that many items could not be finally determined until long after the expiration of the respective calendar years, Maritime did not bill Moore-McCormack for the additional charter hire under Charter MA-153 for any year until November 28, 1958. On that date, pursuant to final accounting and audit, Maritime billed Moore-McCormack for $278,069.30 additional charter

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[5] As noted above, respondents admit their liability for the government's alternative claim for "recapture" of $296,044.22 "subsidy" (third cause of action herein), if Moore-McCormack is held not liable for the $592,088.44 claimed by the government as "additional charter hire."

[6] In 1957 Moore-McCormack had made such an objection in connection with another charter. Other carriers had made similar objections.

hire for charter operations during calendar year 1951.[7] On January 14, 1959, Moore-McCormack was similarly billed, pursuant to final accounting and audit, for $314,019.14 additional charter hire for charter operations during the calendar year 1952.[8] Moore-McCormack did not pay these invoices. Instead, on February 17, 1959, when submitting a fifth and final accounting for the year 1953, it wrote to Maritime, argued for the first time that it was not liable for additional charter hire for either 1951 or 1952, and asserted the right to offset its 1953 losses against its 1951-1952 profits. Maritime rejected that contention. Efforts to have the matter settled in earlier litigation proved futile.

The question presented in this case is also presented in other cases pending throughout the country, often complicated by additional charter provisions which alter the problem. See e. g. the series of cases reported sub nom. American-Foreign Steamship Corp. v. United States, discussed below.

## Discussion

### A

Under the provisions of its subsidy agreement and in accordance with indusfry practice, respondent was required to maintain records which would show the financial results for each terminated voyage.[9]

Sec. 709(a) of the Act, 46 U.S.C.A. § 1199(a), quoted above, calls for a cumulation of the results of all the terminated voyages of the several vessels under a par-

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[7] This sum represents one-half of the charterer's excess "cumulative net voyage profit" for the calendar year 1951. See computation, note 3, supra.

[8] This sum represents one-half of the charterer's excess "cumulative net voyage profit" for the calendar year 1952.

[9] General Order 22, as revised, 15 Fed. Reg. 4935.

ticular charter within the period of a single calendar year. For example, at the end of the year 1951, Moore-McCormack was required to cumulate the net voyage profits from all voyages terminated during that year, and to pay to the government "as additional charter hire" one-half of the amount by which such cumulative net voyage profits exceeded the return specified in the statute, after payment of the charter hire reserved in the charter and the charterer's fair and reasonable overhead expenses. A similar accounting and payment were required at the end of each calendar year during the period of the charter.[10]

There is nothing contingent about the obligation to pay imposed by sec. 709(a), nothing which suggests that there might be a refund or an offset as a result of possible losses in future years.

The provisions of subchapter VII of the Act, 46 U.S.C.A. § 1191 et seq., were intended to provide for (1) an agreed monthly rental or charter hire, and (2) additional charter hire in years of unusually profitable operation.[11] "The obvious purpose of the statutory requirement that charters shall contain a provision for the payment of this 'additional charter hire' is to cut down the excessive profits payable in case the 'charter hire reserved in the charter' has been fixed too low." Dichman, Wright & Pugh, Inc. v. United States, S.D.N.Y., 144 F.Supp. 922, 924, Dimock, J. Congress evidently intended that such additional charter hire should be calculated and paid on a year to year basis,

[10] Clause 6(a) of the charter states specifically that such payment shall be made "as additional charter hire for such year" and that the payment shall be made within thirty days after the end of the year. Clause 6(b) provided for preliminary payments on account, subject to adjustment upon the completion of each final audit.

[11] E. g. years in which such events as the Suez incident would increase the rental value of ships.

and that any averaging of yearly results should be provided for in the subsidy agreements authorized by subchapter VI of the Act, of which Moore-McCormack has had the benefit. The provisions of subchapter VII, including sec. 709(a), were not intended to guarantee a profit or to provide a subsidy to the charterers.

If there were any doubt about the meaning of the statute, it would be dispelled by the proviso at the end of sec. 709(a), which specifically provides that "the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years".

Respondents argue that the proviso is superfluous if the body of the section is given the construction urged by the government; that the proviso was intended merely to prohibit the pyramiding of profits; and that it prohibits only the carrying forward of profits into later profit years, not the carrying forward of profits into later loss years. The last part of respondents' argument overlooks the fact that the proviso deals with the "calculation" of cumulative net profit in future years; those calculations may result in a profit or a loss, depending upon the experience. The proviso certainly prohibits the pyramiding of profits; but that is not its only effect. It also emphasizes the intention of Congress that in determining whether any additional charter hire is payable, and the amount thereof, the calculation shall be made on an annual basis.

When Congress desired cumulation to extend beyond a single calendar year, it expressly so provided. For example, sec. 505(b) of the Act, 46 U.S.C.A. § 1155(b), dealing with construction contracts, states: "* * * if there is a net loss on all such contracts * * * within any income taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year: * * *."

5

Sec. 606(5), 46 U.S.C.A. § 1176(5), dealing with the recapture of subsidy payments, provides for payment to the government of one-half of the carrier's net profits over a ten-year period, insofar as such profit "during such period * * * has averaged more than 10 per centum * * * upon the contractor's capital investment * * * ".

Sec. 607(b), 46 U.S.C.A. § 1177(b), provides that the Commission shall not require a subsidized operator capital reserve fund "unless the cumulative net profits of the contractor, at the time such deposit is to be made, shall be in excess of 10 per centum per annum from the date the contract was executed".

The ten-year "averaging" provision was added to sec. 606(5) in 1938, but Congress included no similar provision for averaging in sec. 709(a), 46 U.S.C.A. § 1199(a), with which we are concerned in this case.

Both sides have cited the legislative history of these and other provisions of the Merchant Marine Act and of various bills which did not pass, but such history offers no guide to the construction of sec. 709(a). No legislative discussion of sec. 709(a) has been cited or found. Granted that the history cited shows that the shipping industry is cyclical, the several provisions of the Merchant Marine Act show plainly that Congress gave effect to the cyclical factor in providing for the recapture of subsidy payments, in sec. 606(5), but did not give effect to it in providing for additional charter hire, in sec. 709(a).

The remarkable series of cases reported sub nom. American Foreign Steamship Corp. v. United States, 2 Cir., 265 F.2d 139 and 144, rev'd 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491, opinions on remand 291 F.2d 598, dealt with a number of charters, some of which contained a clause, the first paragraph of which was like Clause 6 of the charter in the case at bar, but contained additional paragraphs which made the issues in those

cases quite different from the issue presented here. See particularly 291 F.2d at 614. The reason for those additional paragraphs in the charters involved in the Second Circuit cases was explained by Judge Hincks, 265 F.2d at 140, 141. Almost all of the discussion in the various opinions of the Judges of the Second Circuit and all of the discussion in the opinions of the Justices of the Supreme Court dealt with other questions than the problem presented by our case. The Supreme Court intimated no view as to the merits of the underlying litigation. 363 U.S. at 691, 80 S.Ct. 1336, 4 L.Ed.2d 1491. However, in two opinions filed by Judge Clark, in which Judge Waterman concurred, 265 F.2d at 148, 149, 150, 151, and 291 F.2d at 610, 611, Judge Clark discussed the paragraph which is similar to Clause 6(a) of the Charter in the case at bar. He said:

> "Turning now to Clause 13 itself—quoted in full in the opinion—it should be noticed that it is not a provision for claim adjustment; nor does it in any way suggest that it was meant to deal with the professing of claims for refund. Clearly it is what it is labeled as being, namely, a provision for 'Additional Charter Hire.' It follows naturally after Clause 12, covering 'Basic Charter Hire,' and in its main section provides a scale for such additional hire based on cumulative net voyage profits of the charter in any *calendar year*. The emphasis on yearly accountings is obvious." (Emphasis in original).[12] See also American Export Lines, Inc. v. United States, Ct.Cl., 290 F.2d 925.

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[12] The majority opinions did not hold the contrary. The most recent decision remands some of the cases to the District Court "to determine whether or not and to what amount valid claims exist on behalf of the libelants against the United States under the charters in suit." 291 F.2d at 609, 610.

Both sides have cited cases dealing with various types of agreements calling for percentage rentals or using the terms "profits", "net profits", "net income profits" or "cumulative net profits", or various types of statutes using those terms.[13] Those cases are not particularly helpful in the case at bar, where the term "cumulative net *voyage* profits" must be read in the light of the entire statute and charter.

Respondents rely on an opinion by an Assistant General Counsel of Maritime, rendered in 1941 and since followed by Maritime, which construed sec. 709(a) to permit *losses* from an earlier year of a charter term to be carried forward to a later profit year, so that no additional charter hire would be payable at the end of the later year unless there were a cumulative net voyage profit from all years up to that time. However, Maritime has always maintained that the proviso at the end of sec. 709(a) prohibits the carrying forward of cumulative net voyage *profits* from an earlier year into later profit *or* loss years, either (a) to pyramid the profits on which additional charter hire would have to be paid, *or* (b) to be offset by later losses, so as to require a refund (or cancellation) of the additional charter hire paid (or payable) on account of the cumulative net voyage profit of the earlier year.

The Department of Justice disagrees with Maritime

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[13] Cited by the government: Rushlight v. United States, 9 Cir., 259 F.2d 658; Gluck v. Commercial Merchants Nat. Bank & Trust Co., S.D.Ill., 85 F.Supp. 287, aff'd 181 F.2d 773; Burnet v. Sanford & Brooks Co., 282 U.S. 359, 51 S. Ct. 150, 75 L.Ed. 383; Hamden Holding Corp. v. United Men's Shops, Inc., 127 Conn. 500, 18 A.2d 356; Carlson v. D. A. Schulte, Inc., 124 Misc. 880, 209 N.Y.S. 631; Grosse v. Harman, 9 Cal. App. 650, 100 P. 348.

Cited by the respondents: Laystrom v. Continental Copper & Steel Industries, N.D.Ill., 133 F.Supp. 130; Beneficial Corp. v. Reading and Southwestern St. Ry. Co., E.D.Pa., 91 F.Supp. 803, aff'd 185 F.2d 238; Towles v. South Carolina Produce Ass'n, 187 S.C. 290, 197 S.E. 305.

to the extent that Maritime would permit *losses* to be carried forward. Justice agrees with Maritime that *profits* may *not* be carried forward, which is the important issue in the case at bar.

Respondents are forced to concede that Maritime's construction would not relieve Moore-McCormack from liability for the additional charter hire claimed by the government in this case, since there were no *earlier* loss years in the operations under the charter with which we are concerned. An argument based on contemporary administrative construction would not avail respondents in this case, since the administrative construction has been to carry forward *losses into later profit* years, not to carry back losses of later years to offset earlier profits. The contemporaneous administrative construction on the point at issue in the case at bar has been uniformly against the position taken by respondents.

Respondents argue that it is illogical and unfair for Maritime to allow the carry-forward of earlier losses into later profit years, and not to allow the carryback of later losses into earlier profit years. From this respondents reason that the statute should be construed to allow losses to be both carried forward and carried back. The government quite properly replies that even if the construction adopted by Maritime is correct, Congress had the right to frame the statute as it saw fit, and that the courts cannot change the meaning of the statute even if they should happen to think that some other statute would be more logical, generous or wise.

It seems quite clear to me that the statute requires the computation of additional charter hire in this case on the basis of the cumulative net voyage profits of each year separately, without a second cumulation or averaging over the life of the charter.

Therefore, the statute must control, irrespective of the provisions of the charter or the conduct of the

parties. However, if material, the construction adopted by the court is supported by the terms of the charter and the contemporaneous construction of the statute by the parties.

B

The government also contends that respondents are estopped to deny the validity of the government's claim for additional charter hire because of the following acts and failures to act on the part of Moore-McCormack:

In 1941, Moore-McCormack filed a legal memorandum with Maritime in which it argued that sec. 709(a) required separate calendar year cumulation and payment of additional hire "without abatement for past or future losses." [14] In connection with several previous charters Maritime had refused to permit profits to be carried forward and offset by later losses. Moore-McCormack had objected, but because of the relatively small amount involved did not press its claims. In each of its annual accountings to Maritime under Charter MA–153, Moore-McCormack calculated the additional charter hire on the basis of strict calendar year cumulation without any attempt to carry back losses sustained in subsequent calendar years and offset them against the cumulative net voyage profits of earlier calendar years. In calculating the subsidy to which it was entitled under its subsidy agreements, Moore-McCormack always deducted as a subsidy expense its liability for additional charter hire for the years 1951 and 1952, based upon separate annual calculations of cumulative net voyage profits. It is true that such accountings

[14] That interpretation of the chartering provisions was advanced by Moore-McCormack in an attempt to obtain further allowances under the subsidy provisions of the Act, sec. 601 et seq., 46 U.S.C.A. § 1171 et seq.

were in the form prescribed by Maritime (G.O. 74), but Moore-McCormack did not claim that such deductions, on the basis of calendar year cumulation, were tentative only, or contingent upon its raising at some indefinite future date the argument it now advances for "averaging" profits and losses over the whole life of the contract. When Moore-McCormack realized that it had sustained a loss for the calendar year 1953 under Charter No. MA–153, it did not argue "averaging". Instead, it applied for and obtained the right to make fewer sailings with the chartered vessels than were required in the original charter. Moreover, it requested and obtained several extensions of the chartering period.

Clause 39 of Moore-McCormack's Charter No. MA–153 specifically provided that the charter could be terminated after one year's operation, by either Maritime or the charterer giving ninety days' written notice to the other party, although the charterer's right to terminate may have been qualified by the subsidy agreement. The government argues that it might have terminated the charter or refused to renew it if Moore-McCormack had not apparently acquiesced in Maritime's position that under sec. 709(a) the cumulative net voyage profit of an earlier year cannot be offset by future losses.

It is very doubtful whether respondents *can* be estopped from contesting the government's claim for additional charter hire, in view of such cases as Sword Line v. United States, 2 Cir., 228 F.2d 344 and 230 F.2d 75.[15] And it is unlikely that the government would

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[15] Affirmed as to admiralty jurisdiction, 351 U.S. 976, 76 S.Ct. 1047, 100 L.Ed. 1493. *See* also American Export Lines, Inc. v. United States, Ct.Cl. 290 F.2d 925; at 931-32; Dichman, Wright & Pugh, Inc. v. United States, S.D.N.Y., 144 F.Supp. 922, 925; but

have terminated the operation of the Good Neighbor Fleet simply because Moore-McCormack indicated an intention to raise the pending question.

However, in view of this court's construction of the statute and charter as requiring that in this case the annual charter hire be computed and paid separately for each calendar year, and prohibiting any further cumulation or averaging, it is not necessary to decide the estoppel issue.

Counsel will prepare an appropriate order for a judgment in favor of the government, giving effect to this opinion.[16]

## Supplemental Opinion after Argument on the Question of Interest.

Sec. 6(a) of the charter required payment of additional charter hire "within thirty (30) days after the end of such year * * * ". However, the government made no effort to enforce this provision for a number of reasons—including the fact that it was impossible to calculate the exact amount due until Moore-McCormack had ascertained and reported many items which could not be determined until more than thirty days after the end of the year.

Moore-McCormack first accounted to Maritime for its profits from 1951 charter operations on August 27,

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see St. Louis, B. & M. Ry. v. United States, 268 U.S. 169, 174, 45 S.Ct. 472, 69 L.Ed. 899; Callanan Road Improvement Co. v. United States, 345 U.S. 507, 513, 73 S.Ct. 803, 97 L.Ed. 1206; Dollar S.S. Line v. United States, 9 Cir., 75 F.2d 444.

[16] So that there may be no misunderstanding, at the request of counsel, I have inserted the words "in this case" in the next to last paragraph of section A of the foregoing opinion and in the next to last paragraph of the opinion itself, in order to make clear that I intimate no opinion one way or the other on the issue whether losses may be carried forward into subsequent profit years.

1953, and for its profits from 1952 charter operations on November 27, 1953. Thereafter it submitted a number of supplementary accountings, six for 1951 and five for 1952. The final accounting for 1951, filed on October 9, 1958, was promptly audited by Maritime, which billed Moore-McCormack on November 28, 1958, for the additional charter hire shown thereby. The final accounting for 1952 was filed on November 25, 1958, and Maritime billed Moore-McCormack on January 14, 1959.

The several accountings filed by Moore-McCormack for each year included the items upon which (1) its claim for subsidy and (2) its obligation for additional charter hire were based. The claim and the obligation were interdependent, and both varied from time to time as additional items were brought into the successive accountings. Payments on account of subsidy were made by Maritime from time to time, but counsel for the government concedes that it is not possible to tell from the evidence in this case just when the interplay of the accountings and the payments first showed a net profit to Moore-McCormack for either of the years in question upon which some additional charter hire would have been payable. The final subsidy payment was only 10%, so the date in question must have been well before the final accounting, and therefore is a factor which should be taken into account in determining the proper rate of interest to be allowed for the period during which interest is clearly payable.

That period begins either with the date of the final accounting for each year—October 9, 1958, for the year 1951, and November 25, 1958, for the year 1952—or with the date on which the amounts shown to be due for additional charter hire were actually billed by the gov-

ernment—November 28, 1958, for the year 1951, and January 14, 1959, for the year 1952.

All factors considered, including the efforts which were made to obtain a decision on the principal question at issue in the case, I conclude that interest at the rate of 5% per annum should be allowed on $278,069.30 from November 28, 1958, to the date of judgment (for the year 1951), and on $314,019.14 from January 14, 1959 (for the year 1952). Of course, interest on the judgment will run at the rate of 6% per annum from the date thereof.[1]

[1] I do not intimate that interest might not properly be charged for some period before the final accounting on the amounts of charter hire shown to be due by the earlier accountings for a particular year, if the evidence showed those calculations and the payments made by the government on account of subsidy more clearly than they are shown on the present record.

PENDING CHARTER HIRE CASES

*A. H. Bull Steamship Co.* v. *United States* (S.D. N.Y. Ad. 181-349)

*A. L. Burbank & Co., Ltd.* v. *United States* (S.D. N.Y. Ad. 182-103)

*American Export Lines, Inc.* v. *United States* (S.D. N.Y. Ad. 191-109)

*American Export Lines, Inc.* v. *United States* (S.D. N.Y. 61 Ad. 611)

*American President Lines, Ltd.* v. *United States* (N.D. Cal. Ad. 28425)

*Black Diamond SS Corp.* v. *United States* (D. Md. Adm. 3885)

*Blidberg Rothschild Co., Inc.* v. *United States* (D. Del. Adm. 1758)

*Coastwise Line* v. *United States* (N.D. Cal. Adm. 27398)

*Dichman, Wright & Pugh, Inc.* v. *United States* (S.D. N.Y. Ad. 182-397)

*Luckenbach Steamship Co., Inc.* v. *United States* (S.D. N.Y. Ad. 187-92)

*Luckenbach Steamship Co., Inc.*, v. *United States* (C.A. 2, No. 27777)

*Lykes Bros. Steamship Co., Inc.* v. *United States* (E.D. La. Adm. 2817)

*Marine Transport Lines, Inc., et al.* v. *United States* (D. Del. Adm. 1747)

*Mississippi Shipping Co., Inc.* v. *United States* (E.D. La. Adm. 2845)

*North Atlantic & Gulf SS Co., Inc.* v. *United States* (S.D. N.Y. Ad. 183-255)

*North Atlantic & Gulf SS Co., Inc.*, v. *United States* (S.D. N.Y. Ad. 184-37)

*Pacific-Atlantic SS Co.* v. *United States* (D. Del. Adm. 1722)

*Pacific-Atlantic SS Co.* v. *United States* (D. Del. Adm. 1737)

*Pacific Far East Line, Inc.* v. *United States* (N.D. Cal. Adm. 27170)

*Pacific Transport Lines, Inc.* v. *United States* (N.D. Cal. Adm. 27101)

*Pan-Atlantic SS Corp.* v. *United States* (D. Del. Adm. 1816)

*Pope & Talbot, Inc.* v. *United States* (N.D. Cal. Adm. 21761)

*Prudential Steamship Corp.* v. *United States* (S.D. N.Y. Ad. 292-293)

*Smith-Johnson SS Co.* v. *United States* (D. Del. Adm. 1755)

*South Atlantic SS Line, Inc.* v. *United States* (D. Del. Adm. 1735 and 1757) (2 cases)

*Sprague Steamship Co.* v. *United States* (D. Mass. Adm. 53-80-F)

*Stockard SS Corp.* v. *United States* (S.D. N.Y. Adm. 183-200)

*T. J. Stevenson & Co., Inc.* v. *United States* (S.D. N.Y. Ad. 184-383)

*United States* v. *American President Lines, Ltd.* (D. Md. Ad. 4375)

*United States* v. *Coastwise Line* (N.D. Cal. Adm. 28466)

*United States* v. *Cosmopolitan Shipping Co., Inc.* (S.D. N.Y. 62 Ad. 855)

*United States* v. *North Atlantic & Gulf SS Co., Inc.* (S.D. N.Y. Bankruptcy Index No. 93,343)

*United States* v. *Shepard SS Co.* (D. Mass. Adm. 62-34-F)

*United States* v. *Stockard SS Corp.* (S.D. N.Y. 62 Ad. 781)

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No. 862

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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UNITED STATES OF AMERICA, *Petitioner*,

v.

MOORE-McCORMACK LINES, INC., AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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## BRIEF FOR RESPONDENTS IN OPPOSITION

### OPINIONS BELOW AND JURISDICTION

The opinions below and jurisdictional requisites are cited and set forth in the petition.

### QUESTION PRESENTED

Whether section 709(a) of the Merchant Marine Act, 1936, which provides for payment to the United States of 50 percent of "cumulative net voyage profits" derived from the operation of government-chartered vessels, requires cumulation (offsetting) of annual profits and losses over the entire period of the charter

in determining the amount of profits to be shared with the Government.

The court of appeals held that such cumulation is required by statute. The Government urges that cumulation is required when a profit year follows a loss year, but is prohibited when a loss year follows a profit year.

## STATUTE INVOLVED

Section 709(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1199(a)), provides:

> Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

## COUNTERSTATEMENT OF THE CASE

From 1951 through 1957, Moore-McCormack Lines, Inc., bareboat-chartered three passenger vessels from the Maritime Administration, and operated them in the trade between New York and South America. The charter provided that the company would pay a fixed monthly charter hire of $22,000 for each vessel (called "basic charter hire"), and also that it would pay

"additional charter hire," as described in section 709(a), *supra*, equal to one-half of the "*cumulative* net voyage profit in excess of 10 per centum per annum"[1] realized from the operation of the vessels.

Subsidy has been paid by Maritime to the company since 1938 to support these operations under a series of operating-differential subsidy agreements pursuant to title VI of the Merchant Marine Act, 1936 (46 U.S.C. 1171-1182). The applicable agreement was amended in 1951 to provide that subsidy would be continued to December 31, 1957, on condition that the company maintain sailings with the chartered vessels and build new vessels to replace them at the termination of the charter. The maintenance of this service was deemed essential by Maritime to the interests and prestige of the United States, and the charter could not be terminated except with the consent of the Government (Moore. A25-A27).[2]

During 1951 and 1952, the operation of the vessels, before payment of subsidy, resulted in losses to the company of $1,171,883 and $4,298,245, respectively (Moore. A33). After computation of subsidy for these years, however, the operation showed "net voyage profits," one-half of which amounted to $592,088. The latter amount would have been payable to Maritime under section 709(a) if the charter had terminated at the end of 1952. However, during the years 1953

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[1] Emphasis added in quotations unless otherwise indicated.

[2] The Government has filed in this Court the appendices printed for the use of the court of appeals. References herein to Moore-McCormack's appendices A and B (white volume) are designated "(Moore. A1, B1 etc.)," following the pagination employed therein.

through 1957, the vessels sustained losses (after subsidy) of $6,000,000 (Moore. A23). Since these losses far exceeded the 1951-1952 profits, the company contended that there were no "cumulative" profits to be shared with the Government under section 709(a).

The district court held (accepting the argument which the Government has now repudiated in its petition) that the phrase "cumulative net voyage profits" required the cumulation only of profits and losses of individual voyages terminated during each calendar year, and did not permit any cumulation of profits and losses from year to year.

The court of appeals reversed and held that section 709(a) required the cumulation of annual profits and losses over the period of the charter. Since the large 1953-1957 losses more than offset the 1951-1952 profits, it held that no "additional charter hire" was due.

## ARGUMENT

It is respectfully submitted that review by this Court is unwarranted. No conflict exists, and the opinion of the court below is well reasoned and exhaustively analyzes every theory of statutory construction advanced by the Government. That opinion has construed section 709(a) in a manner which harmonizes all of its parts, gives effect to the purpose of the statute and the intent of Congress, and avoids the absurd result flowing from the latest statutory construction urged by the Government. There is no recognized consistent administrative construction or practice in conflict with the opinion of the court of appeals, and the scope and importance of the issue has been greatly exaggerated.

**1. The Decision Below Is Correct and Leaves Nothing to be Added By This Court**

Three possible constructions of section 709(a) have been advanced: (i) that profits and losses for the several years comprising the life of the charter should be cumulated or combined in reaching the amount of profit to be divided with the Government (the position of the court below); (ii) that each year's results be treated separately, with no cumulation or offsetting (the position originally taken by the Government but rejected by the court of appeals, and now confessed to be erroneous in the petition for certiorari); and (iii) the lastest construction advanced by the Government, that losses may be offset by profits where the loss year precedes the profit year but may not be offset where the profit year precedes the loss year. The third construction, which was urged by neither party, the court nevertheless considered and found "capricious" because, among other reasons, it would "require additional charter hire of $50,000 of a charterer who has excess profits of $100,000 in one year and a loss of a like, or even a much larger, amount in the succeeding year, when no additional hire would be due if it lost $100,000 the first year and had excess profits in a like amount in the second year" (Pet. 29-30).

The court below correctly pointed out that cumulation or offsetting of losses against profits, regardless of which precedes the other, (a) gives effect to the word "cumulative," which appears four times in section 709(a) (Pet. 23); (b) harmonizes that section with the parallel subsidy "recapture" provisions of the act (sections 606(5) and 607) which provide for the repayment to the Government of operating differential subsidy in amounts equal to one-half of profits in excess

of 10 percent per annum (Pet. 25); (c) carries out the intent of Congress to allow vessel operators to accumulate reserves in profit years to offset losses in an industry of a highly cyclical nature (Pet. 17, 27); (d) avoids the absurdity that charterers incurring the same profits and losses pay different amounts of additional charter hire depending upon whether the losses precede or follow the profits (Pet. 29-30); and (e) gives vitality and meaning to the proviso at the end of section 709(a) (Pet. 24, 29).

The Government focuses on the words in the statute "whenever, at the end of any calendar year," and argues that these words create an irrevocable obligation to pay additional charter hire at the end of any year in which the cumulative results up to that date show a profit. If a loss year then occurs, the Government contends that a new cumulation cycle commences. These contentions add a concept of irrevocability to the statute which is not present in its language, and read the word cumulative out of the statute where, as here, loss years follow profit years.

The "calendar year" language on which the government relies was designed merely to establish uniform calendar year accounting procedures for charter and subsidy contracts (Moore. B1-B20). Additional charter hire is computed with reference to a percentage of profits "per annum" and annual accountings are necessary to determine profit and loss, and capital necessarily employed upon which the 10 percent annual return is computed. Only after these computations are made are the final annual results known from which can be determined the extent and effect of cumulation.

Clause 6(a) of the Moore-McCormack charter (Pet. 20, ftn.) confirms this interpretation and is consistent with the opinion of the court of appeals. It requires a payment of additional charter hire only "*if* at the end of the calendar year 1951, *or* any subsequent year *or* at the termination of this Agreement, the cumulative net profit . . ." shall exceed 10 percent per annum. This language, specifying alternative dates, clearly suggests reappraisal of the year-to-year results at the end of each accounting period, and at the termination of the charter. There is no suggestion in this clause that the scope of cumulation is limited or cut off at the end of a profit year, if later losses occur.

The contention of the Government that payments are "absolutely final" (Pet. p. 8) is further refuted by clause 6(b) of the charter (Pet. p. 20, ftn.), which provides for "preliminary payments" on account of profit sharing hire "at such times and in such manner and amounts as may be required by the Owner [Maritime]; . . ." These payments are stated to be subject to adjustment and refund "to the Charterer as may be required." This language makes it clear that the accounts of the parties were to be kept open for mutual adjustment as required for items of revenue and expense recorded after the end of the year in question, for final subsidy determinations customarily not completed for several years (Moore. A33-A35), and for comparison of profit and loss results during the respective years of the charter. The statute does not make the payments final or irrevocable; the charter expressly states that they are not.

As for the proviso at the end of section 709(a), the court below was correct in holding that it was designed to prevent any suggestion that profits may be pyra-

mided on later profits, thus duplicating payments with respect to the same profits. For example, if a charterer earned $100,000 during each of two consecutive years, the proviso prevents a computation under which the $50,000 of profits retained by the charterer for the first year would be added to the $100,000 of profits the second year, and then be divided again with the Government. The proviso refers only to the carrying forward of profits into a *profit* year, and does not refer to the carrying forward of a profit into a *loss* year. If the Government's construction of the "end of any calendar year" language were correct, the proviso would be superfluous.

**2. There Is No Consistent Administrative Practice in Conflict With the Decision Below**

The position of the Government in the courts below was that the administrative practice was wrong and entitled to no weight whatever. It now suggests that a conflict between the court of appeals decision and what the Government now alleges was a valid administrative construction is a ground for review by this Court.

In fact there has been no applicable administrative construction on the question in issue. Furthermore the rationale for the alleged practice of Maritime to disallow cumulation where losses followed profits has never been revealed, its scope is undefined, it was promptly contested, and has been the subject of litigation ever since.

The sole evidence of administrative construction consists of (i) a 1941 unpublished interoffice memorandum of one of Maritime's assistant general counsel (Moore. A37-38), and (ii) a regulation adopted in

1950 to apply to charters made under the Merchant Ship Sales Act of 1946.[3]

[3] The regulation (46 C.F.R. 299.49) provides:

*Calculation of net voyage profit on cumulative basis.* In providing for the calculation of additional charter hire based on the cumulative net voyage profit of the Charterer, Clause 13 of Part II of SHIPSALESDEMISE 303 provides also that such cumulative net profit so accounted for shall not be included in the calculation of cumulative net profit in any subsequent year or period. Pursuant to these provisions of the bareboat charter agreements, only deficiencies in net voyage profits may be carried forward, and then only under the following conditions:

(a) In any instance where a net voyage loss is sustained as a result of operations under SHIPSALESDEMISE 303 during any accounting period terminating at the end of a calendar year and a net voyage profit is realized thereunder in the next succeeding accounting period, the net voyage loss and the net voyage profit for the respective periods may be combined and additional charter hire may be computed on the basis of the net result using the number of days consumed on terminal [sic] voyages during the combined period (together with the number of days during which any of the chartered vessels were inactive during that period) in determining the applicable percentages in accordance with the table set forth in Clause 13 of Part II of the said form of charter.

(b) In any instance where the net voyage profit realized as a result of operations under SHIPSALESDEMISE 303 during any accounting period terminating at the end of a calendar year is less than 10 percent per annum of "capital necessarily employed" during that period and the net voyage profit realized thereunder in the next succeeding accounting period is in excess of 10 per cent per annum of "capital necessarily employed" during such succeeding period, the net voyage profits for the respective periods may be combined and additional charter hire may be computed on the basis of the combined result, using the number of days consumed on terminated voyages during the combined period (together with the number of days during which any of the chartered vessels were inactive during that period) in determining the

The unpublished interoffice memorandum did not even discuss the question of whether losses may be carried back against earlier profits; the memorandum considered only whether losses could be carried forward to offset later profits, which it agreed was proper. It also said that the proviso at the end of section 709(a) was intended, as the court below found, to prevent the pyramiding of profits from year to year (Pet. 24, 29).[4]

The 1950 regulation relied upon to support the administrative practice applies only to charters under the Merchant Ship Sales Act of 1946. The charter here was entered into under the Merchant Marine Act, 1936. The regulation refers to clause 13 of the Ship Sales Act form of charter, which contained a sliding scale of profit-sharing percentages in excess of the 50 percent specified in section 709(a), and prescribes the method of adjusting charterers' accountings under the sliding scale clause to take into account "the number of days consumed on terminated voyages" during consecutive years. The regulation is not directed to the question whether losses may be carried back against earlier profits; it is directed to the situation where a profit year follows a loss or deficiency year.

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applicable percentages in accordance with the table set forth in Clause 13 of Part II of the said form of charter.

*Provided, however,* That in any such instance involving any addendum to SHIPSALESDEMISE 303 whereunder additional charter hire is required to be computed, accounted for, and paid separately, the net voyage profits and net voyage losses thereunder likewise shall be treated separately for these purposes and shall not be combined with those under SHIPSALESDEMISE 303 or any other addendum thereto.

[4] The importance attached by the Government to this memorandum may be judged from the fact that it was produced at the hearing in the district court only on demand of counsel for Moore-McCormack.

Moreover, the agency's attempt to apply the regulation to prevent loss carry-back immediately led to litigation. The regulation has been in effect for thirteen years, and in litigation for ten of these.[5] The Department of Justice has attempted to upset the regulation even on the point which it clearly covers, namely, the carry-forward of losses against later profits, and has heretofore instituted suits to recover charter hire from some of the charterers on the theory that loss carry-forward should not have been allowed.

Maritime's rationale for its refusal to permit the carry-back of losses, therefore, remains a mystery. The administrative practice must be clear, unambiguous, and uncontested to receive weight in construing a statute. *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 48 (1939); *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16 (1932).

### 3. The Issue Is of Limited Importance

The petition implies that the issue in this case is of controlling importance in thirty-five pending cases (Pet. 53-54) and suggests that many millions of dollars are involved. All of these cases are stated in the petition to involve 1946 Act charters; none, a 1936 Act charter such as that involved here. Also, the issue is but one of several in the litigation and the figures are grossly exaggerated.

We have, so far as possible, checked the accounting figures in the cases listed by the Government. Of the thirty-five cases, five duplicate other cases on the same list, being either cross-libels of the Government on the

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[5] See list of cases in *American-Foreign Steamship Corp.* v. *United States*, 265 F. 2d 131, 143 (2d Cir. 1958).

same contracts or actions for declaratory judgment raising issues on the same contracts.

In thirteen of the remaining thirty cases, the total amount directly involved in the cumulation question is about $790,000, of which two-thirds relates to subsidized operators whose net claims would be further reduced approximately one-half by subsidy recapture adjustments (Pet. 22). In thirteen others, the issue either does not exist, or becomes material only if other accounting disputes are decided against the Government.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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